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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 MICHELLE MARINO, *et al*,

4 Plaintiffs,

New York, N.Y.

5 v.

16 Civ. 1122 (VEC)

6 COACH, INC.,,

7 Defendant.

8 -----x

9 June 5, 2018

3:00 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

13  
14 APPEARANCES

15  
16 HALUNEN LAW

Attorneys for Plaintiffs

17 BY: CHRISTOPHER J. MORELAND

18 KIRKLAND & ELLIS, LLP

Attorneys for Defendant

19 BY: AARON H. MARKS

-and-

20 KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP (NYC)

21 BY: KEVIN A. CYRULNIK

CYNTHIA JORDANO

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(Case called)

MR. MORELAND: Christopher Moreland more Halunen on behalf of the plaintiffs, your Honor.

THE COURT: You are?

MR. MORELAND: Chris Moreland. M-O-R-E-L-A-N-D.

THE COURT: Okay.

MR. MARKS: Good afternoon, your Honor. Aaron Marks from Kirkland & Ellis on behalf of the defendant Coach, and with me is Kevin Cyrulnik and Cynthia Jordano from my prior firm, Kasowitz Benson, also on behalf of Coach.

THE COURT: You fled Kasowitz? You left, you departed.

MR. MARKS: I departed.

THE COURT: So you are now at?

MR. MARKS: Kirkland & Ellis.

THE COURT: Kirkland, okay. Please, be seated everybody.

Mr. Marks, this is your motion. What would you like to tell me?

MR. MARKS: Sure. Thank you, your Honor.

If your Honor may recall, in your August 28, 2017 decision, you dismissed Marino's New Hampshire Consumer Protection Act claim, plaintiff's fraud claim under New York Law, and plaintiff's unjust enrichment claim on the basis that plaintiffs did not adequately plead a cognizable injury. The

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1 Court recognized that the original consolidated class action  
2 complaint was devoid of allegations that address the how and  
3 why of plaintiff's product confusion theory, but your Honor  
4 gave the plaintiffs the opportunity to seek to amend their  
5 complaint to adequately allege the how of the deception.

6 In our motion to dismiss which we filed after they  
7 served their amended complaint, we maintain that plaintiffs are  
8 still unable to satisfactorily plead that they believed that  
9 they were purchasing an item that was of the same quality as  
10 visually similar products sold in Coach retail stores.  
11 Specifically, there are four plaintiffs here. With two of them  
12 it is very straightforward, Rael and Hinkey. There are no new  
13 allegations as to either of them so they can't possibly satisfy  
14 the burden that your Honor laid out in your August 20th order.

15 THE COURT: I think they are hanging their hat on  
16 Esparza and Marino.

17 MR. MARKS: Correct. Correct.

18 Although the new amended complaint suggests that at  
19 some point products sold by Coach at retail are identified in  
20 the amended complaint as being similar to the wristlet bags  
21 that were purchased by Marino and Esparza, their allegations  
22 still fall short of pleading with particularity that they were  
23 deceived.

24 THE COURT: Well, let me ask you this. So, here is  
25 what I understand their theory now to be. They believe that

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1 the hang tag price, the manufacturer's suggested retail price  
2 is an indication of quality, that is, and the quality is  
3 equivalent to retail quality. That was their understanding  
4 when they were buying at the outlet store, that they were  
5 getting retail quality goods. As to these particular wristlets  
6 they say the quality in fact is not as good because there are  
7 differences, that I think I can assume the plaintiffs intend to  
8 say means the quality was different, that is the Coach labels  
9 and the Coach tags were different, presumably less designy or  
10 something -- I don't know -- and that therefore they bridge the  
11 gap. They thought they were getting, by virtue of the price  
12 tag, they thought they were getting retail quality goods. In  
13 fact, they've got these two bags and when they compare them to  
14 the retail quality goods they are not in fact of equivalent  
15 quality.

16 MR. MARKS: That's their allegation.

17 THE COURT: That's their theory.

18 MR. MARKS: So, there are two main problems with how  
19 they tried to plead this.

20 First of all, they do not adequately plead that the  
21 products that were at retail were in fact of a superior  
22 quality. They were supposed to do investigation pursuant to  
23 Rule 9B which governs here, and while they have pulled screen  
24 shots of products that were on a website through the Wayback  
25 Machine app, while they say that the tags are shinier or that

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1 the emblems are different, they have not alleged how that is  
2 that that is an indication of these products not being of an  
3 equally high quality, meaning that they in fact concede that  
4 these are -- the one wristlet is a leather bag, the other is of  
5 a signature fabric. So, in our mind the investigation which is  
6 required here has not been sufficient for them to identify,  
7 with particularity, what the lack of quality is. That's one  
8 problem.

9 The other problem, which we see as perhaps even more  
10 significant, is the way they plead this is that they went and  
11 found these screen shots of these other products but the  
12 amended complaint is devoid of any allegation suggesting that  
13 Marino or Esparza were themselves in any way deceived, meaning  
14 that --

15 THE COURT: Well, I agree that they have not alleged,  
16 which would be one way to allege these cases. You know, I  
17 thought when I wandered into the outlet store that I was  
18 getting a real Poppy bag and imagine my surprise and  
19 disappointment when I found out it was not because it actually  
20 has a schlockier label. Right? That's one way to allege this.  
21 But, why isn't it acceptable to do what they have done which is  
22 to do it in two steps which is that I thought I was getting  
23 retail quality goods. I bought the Poppy bag, the Poppy bag is  
24 not retail quality. Not that I thought that I was buying a  
25 retail quality but in fact it is of lower quality than the

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1 Poppy bag that is actually sold at the retail stores.

2 MR. MARKS: What they haven't alleged is that they  
3 were even aware --

4 THE COURT: Right.

5 MR. MARKS: -- that there was a retail bag that  
6 looked similar.

7 THE COURT: But they were aware that Coach sells  
8 retail bags.

9 MR. MARKS: They're aware that there is in fact a  
10 retailer named Coach.

11 THE COURT: Right.

12 MR. MARKS: They don't allege that they have ever been  
13 in a retail Coach store or ever looked at the website that was  
14 there or was certainly not aware of this product. And so, with  
15 respect to the causes of action here that are being pled, which  
16 is fraud and unjust enrichment, all of which you determined in  
17 the August 28th order, fall under 9B. The notion of them  
18 believing that this was in fact a retail product and being  
19 confused and being deceived, you can't have that unless there  
20 was at least some initial thought that there was a retail  
21 product that this was the same as, meaning that --

22 THE COURT: Okay.

23 MR. MARKS: Your Honor dealt with this also in the  
24 Belcastro case which was the Burberry matter.

25 THE COURT: Yes. I was lucky enough to get two of

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1 these.

2 MR. MARKS: Even the way your Honor framed the  
3 instruction for the plaintiff there to try to reframe and  
4 reallege his claim, you stated in your initial decision of  
5 Belcastro and followed up on it, plaintiffs will have the  
6 opportunity to amend an alleged injury based on price premium  
7 theory that he overpaid or that the product he purchased was  
8 different than what he expected. Plaintiff is forewarned,  
9 however, that non-specific allegations that Burberry sells the  
10 same shirt for less or that plaintiff was led by Burberry's  
11 action to believe erroneously that he was purchasing a product  
12 normally sold in regular Burberry retail stores without any  
13 factual investigation and support are inadequate to state a  
14 claim.

15 So, here there is no allegation that the plaintiff  
16 believed that they were buying a retail product because there  
17 is no comparison. Much like with the other two who can't point  
18 to a retail product that they can be even confused by, Marino  
19 and Esparza also can't point to a retail product, really,  
20 because they don't allege that they ever considered the retail  
21 products.

22 So, when you are having a claim for fraud, for  
23 example, you can't satisfactorily plead fraud without pleading  
24 that you are in fact deceived. And so here, where there is no  
25 connection between the alleged injury and what Coach did

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1 because there was no contact pled with the actual retail end of  
2 the business, they have not pled fraud.

3 So, that would deal with fraud, with unjust  
4 enrichment, and the New Hampshire Consumer Protection Act  
5 claim. With respect to the express warranty claim --

6 THE COURT: Don't bother with the express warranty.

7 MR. MARKS: Thank you, your Honor.

8 THE COURT: Okay.

9 Mr. Moreland?

10 MR. MORELAND: Thank you, your Honor.

11 Just a housekeeping matter at the beginning. With  
12 respect to the focus on Plaintiffs Rael and Hinkey in their  
13 purported failure to be able to identify specific comparator  
14 products, I would note and remind the Court that with the  
15 exception of Marino, all three of the other plaintiffs are in  
16 fact California purchasers and so they fall under the auspices  
17 of the Court's prior order.

18 THE COURT: Yes.

19 MR. MORELAND: I think it is a bit of a red herring to  
20 focus on them, but be that as it may.

21 THE COURT: To the extent that they asserted claims  
22 under something other than California --

23 MR. MORELAND: Correct.

24 THE COURT: -- they seem to be abandoned.

25 MR. MORELAND: Correct. I just wanted to make sure



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1 that that was clear where those folks were from.

2 So, but your Honor I think hit the nail on the head  
3 with respect to the claim of the MFSRP and what it is supposed  
4 to do. So, I would posit that the very existence of the MFSRP  
5 implies, the whole point of it is to imply that there are  
6 similar products out there in the Coach retail world that are  
7 of a similar variety, otherwise there would be no point to that  
8 product. So, these people are in fact alleging that by virtue  
9 of that, by virtue of the existence of the MFSRP, they are  
10 going in with the intention and understanding that they will be  
11 receiving a retail store quality product but in fact they do  
12 not, by virtue of the fact of the things that your Honor  
13 pointed out which is the, I guess, less fancy nature of the  
14 emblems, of the hang tags, the additional stitching which  
15 indicates that the product may be made from remnants, and those  
16 are specific allegations that are set forth in the amended  
17 complaint. They are cited in the brief and we can certainly  
18 talk about them here. Again, we have provided two specific  
19 examples with respect to Esparza and with respect to Marino  
20 with the bags.

21 THE COURT: They bought the bag so they saw what the  
22 label looked like. They weren't deceived about the quality of  
23 the label.

24 MR. MORELAND: They were able to see what they  
25 purchased, of course, and review that, but they were not aware.

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1 And this is where it gets into a distinction between the cases  
2 that Coach has cited in their brief and the kind of  
3 disappointed bargain hunter cases including Belcastro, Shaulis,  
4 Mulder. Those types of cases.

5 What the Court said in giving us leave to amend was  
6 the problem here is that with your product theory here, you  
7 have not identified products that are similar which we have now  
8 done. So, yes, they were able to look at the specific product  
9 they bought but they don't know necessarily, as consumers, what  
10 in fact the retail product is going to look like and how it is  
11 going to be different. They know when they see.

12 THE COURT: How will they be defrauded?

13 MR. MORELAND: Because the quality of the product is  
14 in fact worse, and that is something within the express  
15 knowledge of the defendants. They know the manufacturing spec  
16 and processes and procedures and materials that go into making  
17 up their products. So, to the extent that the plaintiffs did  
18 not know that, that's not something that they can tell. They  
19 see what they bought but at the same time they are expecting a  
20 quality product that relates to the retail product and that's  
21 not what they're getting. They are, in fact, different  
22 materials, different products, and whether or not they've  
23 ultimately been deceived I guess would be a question for a  
24 reasonable fact finder and not for dismissal at 12(b)(6), I  
25 would argue.

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1 THE COURT: Okay.

2 MR. MORELAND: And I think with respect to the  
3 argument that there has been discussion of when these products  
4 were screenshotted and whether or not they were in existence at  
5 the time of the purchases and whether or not the plaintiffs saw  
6 them and relied on them and made purchases, I think an  
7 interesting case is the Ninth Circuit, Davidson v. Kimberly  
8 Clark which is reiterated last month that the question on a 9B  
9 pleading argument is not necessarily when the individual  
10 plaintiff became aware of the fact that the product was  
11 deceptive, but just the fact that it is when all the other 9B  
12 requirements have been met. And in the Court's initial order I  
13 think your Honor walked through the steps and the facets of  
14 what we needed to prove and said each of them has been met with  
15 the exception, of the "how," which your Honor then went on to  
16 talk about comparisons of a family of products or individual  
17 products that are similar to what the plaintiffs had purchased.

18 THE COURT: Why don't you just go on eBay and buy one?

19 MR. MORELAND: What's that?

20 THE COURT: I said why don't you just go on eBay and  
21 buy one.

22 MR. MORELAND: I don't know.

23 THE COURT: I mean, in terms of research if you had  
24 the two bags, you could compare them.

25 MR. MORELAND: Presumably --

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1 THE COURT: You don't want to invest any more money in  
2 this case than you already have?

3 MR. MORELAND: I guess the pithy -- not pithy, the  
4 smart-mouthed answer would be I don't think it is required  
5 under the law to meet our burden at this stage and, frankly, I  
6 think it is kind of flipping the apple cart on its head to say  
7 that it's the plaintiff's -- now, certainly there is a duty of  
8 investigation and you don't want to be bringing frivolous  
9 claims but at the same time there is a duty on behalf of Coach  
10 not to mislead folks and I don't think anybody here, the focus  
11 in this discussion and the focus of the briefing hasn't been,  
12 and I know that they will say that their pricing scheme is not  
13 deceptive, but I think that is very much an open question.

14 So, I think to ask questions about eBay and all those  
15 kind of things, while interesting, is not a legal burden that  
16 we have to meet to surpass the 12(b)(6) standard.

17 THE COURT: Okay.

18 Mr. Marks?

19 MR. MARKS: Your Honor, with respect to again these  
20 claims that they have brought, again fraud, unjust enrichment,  
21 and the New Hampshire claim, we have already determined they  
22 are fraud-based claims and your Honor was very direct in your  
23 prior order as to what is lacking with respect to each of them.  
24 So, for example, with respect to the New Hampshire-based claim  
25 and the August 28th order, consumers like Marino, viewing the

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1 MFSRPs, may believe that they are purchasing an item that is of  
2 the same or similar quality as visually similar products sold  
3 in Coach retail stores. They have not pled that they believed  
4 that this was similar to a specific item in the Coach retail  
5 store.

6 THE COURT: Not to a specific item but that they  
7 understood that manufacturers' suggested retail price to  
8 indicate that the products that they were buying were retail  
9 quality. That's what paragraph 20 alleges.

10 MR. MARKS: There are no allegations here that Marino  
11 or Esparza believes that the wristlet that they purchased was  
12 in fact a retail product. With respect to the fraud claim, in  
13 order to allege such an injury with particularity, plaintiff  
14 must amend their complaint to allege to what retail goods they  
15 confused the outlet-only products they purchased. To have  
16 fraud they have to be deceived. They have to have relied and  
17 what not. So here, not even having seen the products, they  
18 can't meet fraud.

19 And with unjust enrichment, there is no allegation  
20 they didn't get the benefit of their bargain because, again,  
21 they didn't go in thinking that -- they didn't go in saying I  
22 want to get the Poppy bag or the Saffiano bag and that's not  
23 what happened here.

24 THE COURT: Right.

25 MR. MARKS: So, we think all these claims fail.

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1 THE COURT: All right. Thank you.

2 I am prepared to rule on Coach's motion to dismiss.  
3 Because the parties are familiar with the facts and history of  
4 these cases, I will summarize them only as necessary for  
5 purposes of this ruling.

6 In Coach I, I granted defendant's motion to dismiss  
7 plaintiff's claims for common law fraud, unjust enrichment,  
8 breach of express warranty, and violations of the New Hampshire  
9 Consumer Protection Act -- or the CPA. I did so because  
10 plaintiffs did not alleged any quality-based injury resulting  
11 from their purchases of Coach outlet-only products.  
12 Plaintiffs' theory is that Coach uses MFSRPs -- manufacturers'  
13 suggested retail prices -- that are similar to retail goods in  
14 order to lead shoppers at Coach factory stores to believe that  
15 they are purchasing retail quality goods, when, in fact, the  
16 products sold in Coach factory stores are allegedly inferior in  
17 quality. That's from Coach I, 264 F. Supp. 3d at 570.

18 Assuming that is an actionable theory of fraud, plaintiff's  
19 prior complaint was inadequate because plaintiffs did not  
20 identify any differences in quality between the outlet only  
21 goods they purchased and similar Coach retail products. In  
22 short, the how and why of this fraud were inadequately alleged.

23 Allegations of a difference in quality are critical  
24 because neither New York nor New Hampshire recognized an injury  
25 based solely on deception itself. The fact that plaintiff

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1 believed they were getting a bargain is not a cognizable  
2 injury. See *Belcastro v. Burberry*, 2017 Westlaw 5991782 at  
3 page 3; *Shaulis v. Nordstrom*, 865 F.3d 1 at page 11. "A  
4 plaintiff's 'bear assertion' that a product is deficient in  
5 some way is 'conclusory and can be subjective.'" *Shaulis*, 865  
6 F.3d at 12.

7 In the amended complaint, two of the plaintiffs have  
8 plausibly alleged a difference in quality between the  
9 outlet-only wristlets they purchased and similar Coach retail  
10 wristlets. I pause here to say that plaintiffs have done so by  
11 the slimmest of margins and I am exceedingly skeptical that  
12 discovery will support this theory. That said, plaintiffs  
13 *Esparza* and *Marino* have alleged an injury that is concrete,  
14 objective, and distinct from the fact that they were deceived.  
15 Plaintiff *Esparza* alleged that she purchased a wristlet that is  
16 similar in appearance to a Poppy signature wristlet but  
17 inferior insofar as it is embossed with a different emblem and  
18 tag. That's in the amended complaint at 47 and 48. *Marino*  
19 alleges that the wristlet she purchased is similar in  
20 appearance to the Saffiano wristlet but inferior insofar as it  
21 has a slightly different Coach lettering and additional  
22 stitching. That's in the amended complaint at 49 to 50. These  
23 are narrow differences in quality and plaintiffs theory  
24 requires another logical step for Court to infer that the  
25 differences are indicative of lesser quality but it is a barely

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1 reasonable inference.

2 In response, Coach argues that neither Esparza nor  
3 Marino actually believed that they were purchasing wristlets  
4 similar to the Poppy signature and Saffiano. I agree. The  
5 amended complaint does not allege that either of these  
6 plaintiffs, that either was aware at the time of their  
7 purchases of visibly similar retail wristlets. While in Coach  
8 I the Court posited that would be a way in which a plaintiff  
9 could allege a fraud cause of action, such an allegation is not  
10 necessary to plaintiff's theory of the deception. Plaintiffs  
11 allege that they "believed that the MFSRPs were a  
12 representation that their items were of a same or similar  
13 quality as products sold in Coach's famous retail stores." See  
14 amended complaint at 20. Their theory is not that they were  
15 specifically deceived into purchasing look-alike Saffianos or  
16 signatures. The Court previously held that this theory of  
17 deception is viable because a reasonable consumer might view  
18 the MFSRPs as indicators of quality equivalent to the quality  
19 of Coach retail goods. Coach I at 264 F. Supp.3d 370.

20 I understand Coach's argument to be that allegations  
21 that plaintiffs subjectively believed they were purchasing  
22 look-alike Saffianos or Poppy signatures are necessary to state  
23 an actual injury for purposes of New York or New Hampshire law.  
24 The Court agrees that certainly would be one way to allege  
25 actual injury. "I thought I was getting a Poppy but instead I



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1 got a bag that looked like a Poppy but objectively has a lower  
2 quality Coach emblem and tag." That is not plaintiff's theory,  
3 however. Plaintiffs allege not that they thought the  
4 particular bag purchased matched to specific goods sold in  
5 Coach retail stores but that they generally understood, because  
6 of the MFSRPs, that the goods sold in the outlet store were  
7 equivalent in quality to retail goods. They are injured, they  
8 allege, because the particular bags they purchased were of a  
9 lower quality than similar retail goods. The narrow  
10 differences between the outlet wristlets purchased by  
11 plaintiffs and the retail wristlets described in the amended  
12 complaint are, at this stage, sufficient objective differences  
13 in quality. The amended complaint does not allege a difference  
14 in quality that is vague or highly generalized as the prior  
15 complaint did and as the complaints in the similar Burberry  
16 action that was before me did.

17 I find Coach's arguments with respect to plaintiff's  
18 express warranty claims to be more persuasive. In Coach I, I  
19 held that the MFSRPs are not an express warranty of quality.  
20 The amended complaint includes no additional allegations  
21 relative to this theory and plaintiffs now assert that the  
22 MFSRPs are an express warranty of worth or a former price.  
23 Representations of worth or perceived value of a seller are not  
24 actionable as express warranties. The cases cited by  
25 plaintiffs to support this theory involve far more specific

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1 representation from experts such as art appraisers.

2 Additionally, the MFSRP -- or the manufacturers' suggested  
3 retail price -- do not amount to a warranty of a former price.  
4 A representation of a suggested price is different than a  
5 representation of a former price.

6 Plaintiffs Rael and Hinkey did not substantively amend  
7 their claims. My impression is that they did not do so because  
8 it is plaintiff's position that Esparza and Marino can  
9 represent the entire universe of potential plaintiffs for  
10 common law fraud, unjust enrichment, and violations of state  
11 consumer protection statutes including members of the  
12 nationwide class, multi-state class, and California subclass.  
13 Accordingly, the motion to dismiss is granted in its entirety  
14 as to Rael and Hinkey for the reasons stated in Coach I.

15 In sum, the motion to dismiss is denied as to Esparza  
16 and Marino's claim for fraud, unjust enrichment, and violations  
17 of the New York CPA, and granted as to plaintiff's claims for  
18 breach of express warranty. The motion to dismiss Rael's and  
19 Hinkey's claims for fraud, unjust enrichment, express warranty,  
20 and to the extent they asserted such claims for violations of  
21 the state consumer protection statutes, is granted. The motion  
22 to dismiss did not address Counts One through Five so those  
23 counts remain in the case.

24 By June 15th the parties must submit a joint letter  
25 with a proposed case management plan for discovery. The Clerk

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1 of Court is directed to close the open motion at docket no. 74.

2 The next step is discovery but would the parties like  
3 a referral to the magistrate judge for a settlement conference?

4 MR. MARKS: Your Honor, on behalf of Coach --

5 THE COURT: You have to think about it?

6 MR. MARKS: Yes, I think we will think about it. We  
7 will let you know on the 15th.

8 THE COURT: That's fine.

9 MR. MARKS: Okay.

10 THE COURT: Talk to each other. If you want a  
11 referral to the magistrate, I am happy to give you one. I  
12 don't know who your assigned magistrate judge is.

13 MR. MORELAND: Very good.

14 THE COURT: Anything further? Anything further?

15 MR. MORELAND: No. Sorry, your Honor.

16 THE COURT: Anything further?

17 MR. MARKS: No, your Honor.

18 THE COURT: Thank you very much.

19 o0o